Malayan Banking Bhd v Aktimas Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–143 OF 2001-II
HAMID SULTAN JC
28 SEPTEMBER 2007

Civil Procedure — Limitation of action — Contract — Demand guarantee — Whether limitation period in action against guarantor to commence from date of demand — Whether period of such limitation prescribed under art 94 of Sarawak Limitation Ordinance

Contract — Guarantee — Demand for payment — Whether liability of guarantor commences from date of demand — Whether limitation period in respect of action against guarantor to commence from date of such demand — Whether period of such limitation prescribed under art 94 of Sarawak Limitation Ordinance

The plaintiff sued the first defendant company to recover an outstanding sum of RM2.99m. The second to eighth defendants were sued as the first defendant's guarantors. The guarantee was limited to RM2.45m. The plaintiff's suit was filed on 9 November 2001. The plaintiff thereafter applied for summary judgment. At the hearing of the application, the defendants conceded liability on the part of the first defendant. The parties agreed for the following issue to be tried, ie whether the plaintiff's claim against the defendants was time-barred under the Sarawak Limitation Ordinance ('SLO'). The defendants claimed inter alia that the plaintiff's action against the guarantors was filed after the prescribed three-year limitation period under art 46 of the SLO. The plaintiff however submitted: (1) that time only began to run against it when a demand was made to the guarantors — the first demand being made on 6 August 1998; (ii) that the acknowledgement of its indebtedness by the first defendant and part payments made under its account enlarged or extended the limitation period against the defendants; (iii) the plaintiff's suit against the defendants instituted on 9 November 2001, was within six years from the date of the first demand dated 6 August 1998 and therefore not time-barred pursuant to art 94 of the SLO.

Held, allowing the application with costs:

(1) The Privy Council decision in *Kong Ming Bank Berhad v Sim Siok Eng*

[1982] 2 MLJ 205 was not applicable. *Kong Ming Bank Berhad* did not deal with a demand guarantee, but with an unsecured overdraft. A demand guarantee is related to a secondary liability and is not a primary document. Thus, liability commences from the date of demand. If the guarantor refuses to comply with the demand, he will be deemed to have breached the contract of guarantee and that will not attract arts 40 and/or 46 but art 94 of the SLO (see para 8); *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205 distinguished.

(2) The plaintiff's action against the defendants was not statute-barred. Since the first defendant had by its letter dated 12 August 1998, acknowledged or impliedly admitted that it was indebted to the plaintiff in the sum of RM2,562,623.46 as at 30 July 1998 and further since it was agreed under the guarantee that any admission or acknowledgement in writing by the first defendant of the amount of indebtedness would be binding and conclusive against the guarantors, judgment should be entered against all the defendants jointly (first to eighth defendants) with the proviso that the guarantors' liability be only limited to RM2.45m (see para 9).

[Bahasa Malaysia summary

Plaintif telah menyaman syarikat defendan pertama untuk mendapat balik jumlah yang belum dibayar sebanyak RM2.99j. Defendan-defendan kedua hingga kelapan telah disaman oleh penggerenti-penggerenti defendan pertama. Gerenti itu terhad kepada RM2.45j. Guaman plaintif telah difailkan pada 9 November 2001. Plaintif kemudiannya telah memohon penghakiman terus. Semasa perbicaraan permohonan itu, defendan-defendan telah mengaku liabiliti bagi pihak defendan pertama. Pihak-pihak bersetuju agar isu-isu tersebut dibicarakan, iaitu sama ada tuntutan plaintif terhadap defendan-defendan telah luput had masa di bawah Ordinan Had Masa Sarawak ('OHMS')). Defendan-defendan telah menuntut antara lain bahawa tindakan plaintif terhadap penggerenti-penggerenti telah difailkan selepas tempoh had masa tiga tahun yang ditetapkan di bawah perkara 46 OHMS. Plaintif bagaimanapun berhujah: (1) bahawa masa hanya bermula terhadapnya apabila suatu tuntutan dibuat kepada penggerenti-penggerenti — tuntutn pertama dibuat pada 6 Ogos 1998; (ii) bahawa pengakuan keberhutangannya oleh defendan pertama dan sebahagian bayaran yang dibuat melalui akaunnya melebihi atau melampaui tempoh had masa terhadap defendan-defendan; (iii) guaman plaintif terhadap defendan-defendan bermula pada 9 November 2001, adalah dalam tempoh enam tahun tuntutan pertama bertarikh 6 Ogos 1998 dan oleh itu tidak luput had masa menurut perkara 94 OHMS.

Diputuskan, membenarkan permohonan dengan kos:

(1) Keputusan Privy Council dalam *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205 tidak terpakai. *Kong King Bank Berhad* bukan mengenai tuntutan gerenti, tetapi tentang overdraf yang tak bercagar. Satu tuntutan gerenti adalah berkaitan dengan liabiliti sekunder dan bukan satu dokumen utama. Oleh itu, liabiliti bermula dari tarikh tuntutan. Jika penggerenti enggan mematuhi tuntutan itu, beliau akan dianggap telah melanggar kontrak gerenti dan tidak menarik perkara 40 dan/atau 46 tetapi perkara 94 OHMS (lihat perenggan 8); *Kong Ming Bank Berhad v Sim Siok Eng* [1982] 2 MLJ 205 dibeza.

(2) Tindakan plaintif terhadap defendan-defendan tidak dihalang statut. Memandangkan defendan pertama telah melalui suratnya bertarikh 12 Ogos 1998 mengesahkan atau secara tersirat mengakui bahawa ia berhutang dengan plaintif sejumlah RM2,562,623.46 setakat 30 Julai 1998 dan tambahan pula memandangkan ia bersetuju di bawah gerenti bahawa apa-apa pengakuan atau pengesahan secara bertulis oleh defendan pertama tentang jumlah yang belum dibayar adalah mengikat dan konklusif terhadap penggerenti-penggerenti, penghakiman patut dimasuki terhadap defendan-defendan bersama (defendan-defendan pertama hingga kelapan) dengan proviso bahawa liabiliti penggerenti hanya setakat RM2.45j (lihat perenggan 9).]

Notes

For cases on contract, limitation of action, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4650–4651.

For cases on demand for payment, guarantee, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3892–3914.

Cases referred to

Kong Ming Bank Berhad v Sim Siok Eng [1982] 2 MLJ 205 (distd)

Kwong Yik (Selangor) Banking Corporation Ltd, The v The Malayan Daily Express (1926) Ltd & Ors [1933] 2 MLJ 198

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)

Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504 (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad [1989] 3 MLJ 155 (refd)

Oriental Finance Bhd v Emas Kejuruteraan Sdn Bhd & Ors [2002] 7 CLJ 449 (refd)

Legislation referred to

Rules of the High Court 1980 O14A

Sarawak Limitation Ordinance arts 40, 46, 94

Bexter Michael (Ee & Lim) for the plaintiff.
William Kong (William Kong & Co) for the second to eighth defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's claim against the second to eighth defendants ('defendants') under an O 14A application.

[2] The plaintiff's claim against the first defendant is for the sum of RM2,994,254.80 as at 30 September 2001 with interest thereon and cost. The defendants are sued as guarantors for the first defendant. The liability of the defendants under the letter of guarantee dated 22 October 1996 is limited to RM2.45m. On the day of trial on 18 July 2007, the first defendant through its counsel agreed that liability of the first defendant is not an issue (admitted liability) but only the quantum and requested the court to direct the quantum be assessed before the Registrar. As regards the defendants, it was agreed that the issue be confined to whether the plaintiff's claim against them is statute barred and parties agreed that the matter can be dealt with by submissions on this issue. The plaintiff says that the action against the defendants is based on letter of guarantee which stipulates that the defendants jointly and severally agreed and guarantee to pay the plaintiff on demand and in consequence the demand is necessary. Besides, time did not run against the plaintiff until the demand was made and the liability of the defendants to pay the amount demanded only arises after the demand was made (see *Oriental Finance Bhd v Emas Kejuruteraan Sdn Bhd & Ors* [2002] 7 CLJ 449). The plaintiff avers under the letter of guarantee dated 22 October 1996, that the liability of the defendants accrues on demand. The first demand to the defendants was dated 6 August 1998.

ISSUES TO BE TRIED

[3] The issues agreed by the parties to try before me is whether the plaintiff's present suit against the defendants as guarantors is time barred under the Sarawak Limitation Ordinance ('SLO'). If yes, the plaintiff's suit shall be dismissed. If not, judgment shall be entered against the defendants.

[4] It is common knowledge that SLO is differently worded in contrast to Limitation Act 1953 which is applicable in West Malaysia. For purpose of loan or guarantee or similar documents it will appear that two provisions of the ordinance will be applicable. One provision says that the limitation period is 3 years and the other is 6 years. Hence, the dispute and controversy in this case, which the litigant has agreed to settle by way of O14A

application. The relevant sections of the SLO which need to be considered are as follows: (i) art 40 SLO, (ii) art 46 SLO, (iii) art 94 SLO. In order to determine whether the plaintiff's cause of action is time barred or not, it is necessary to ascertain when the plaintiff's cause of action against the defendants arose.

DEFENDANTS' SUBMISSION

[5] The defendants inter alia submit as follows:

(a) once defence of limitation is raised, the burden is on the plaintiff to prove that the suit or action is brought within the prescribed limitation period; the defendants rely on the case of *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504 where Steve Shim Lip Kiong J (as he then was) stated:

> The burden of proving the action was brought within the limitation period was on the plaintiff.

(b) the plaintiff's suit against the guarantors is filed after the prescribed three years limitation period and in consequence is time barred and ought to be dismissed on the following grounds namely:

(i) letter of guarantee expressly provides liability will arise 'on demand' and the guarantors' liability is only activated upon a demand by the plaintiff. In consequence, a proper demand is a condition precedent to establish a claim against a guarantor. In *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155, Lee Hun Hoe CJ (Borneo) (while delivering the judgment of the court) held:

> A proper demand must be made and it is a condition precedent to establishing a claim against a guarantor.

(ii) In *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 it was stated:

> (2) since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor.

(iii) as the demand here is a condition precedent, it is in the nature of contingency contract and the relevant provision of the SLO which applies in this case is item 46 of the schedule of the SLO and relies

on the case of *The Kwong Yik (Selangor) Banking Corporation, Ltd v The Malayan Daily Express (1926), Ltd, & Ors* [1933] 2 MLJ 198.

PLAINTIFF'S SUBMISSION

[6] The plaintiff inter alia submits as follows:

(a) the guarantors have agreed to jointly and severally to pay the plaintiff on demand. In consequence, the demand is necessary and time did not run against the plaintiff, until the demand was made. Further, there was acknowledgement of debts. In *Oriental Finance Bhd*, Nik Hashim J held:

(i) the first defendant's liability to pay the amount owing only arose after the plaintiff's letter of demand dated 17 November 1998 was issued. Since the first defendant had failed to pay the outstanding sum, the plaintiff's cause of action therefore accrued on or about 17 November 1998 when the demand was made and not on 16 June 1986 when the loan was disbursed. Hence, the institution of the plaintiff's action on 21 March 1999 was obviously within the six-year limitation period as prescribed under s 6 of the Act.

(ii) The said letter was a clear admission by the first defendant that it took a loan of RM410,000 from the plaintiff. Given that the first defendant also acknowledged the interest accruing thereon and did not dispute the existence and/or the calculation of the interest chargeable, it was therefore an implied admission by the first defendant that it owed the plaintiff the total outstanding loan sum together with the continuing interest thereon which amounted to RM1,229,389.86.

(iii) The first defendant's admission of its debt was binding on the second and third defendants as guarantors based on their liability as principal debtors under the guarantee. Therefore, they were jointly and severally liable to the plaintiff for the first defendant's debt."

(b) in this case, the first defendant however requested that the plaintiff gives it time to come up with the funds and/or proposals to settle the outstanding sum. When the defendants fail to settle any of the outstanding sums despite having been given the time to do so by the plaintiff, the plaintiff's advocates vide their letter dated 12-06-2000 ('the second demand') demanded all the defendants to settle the said outstanding sum.

(i) whether the plaintiff's action falls under article 40 and/or 46 and/or 94 of the SLO which prescribe as follows:

	Description of Suit	Period of Limitation	Time from which period begins
40.	For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
46.	For compensation for breach of a promise to do anything at a specified time, or upon specified time, or upon the happening of a specified contingency.	Three years	When the time pecified arrives or the contingency happens.
94.	For compensation for the breach of a contract in writing.	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.

The letter of guarantee is an 'on demand' guarantee or a promise by the guarantors to pay on demand seems to fit the description of suit under article 40 'For money lent under an agreement that it shall be payable on demand'. However under article 40, time from which period begins to run is 'When the loan is made'. The plaintiff's action, being a cause of action which arose upon demand and not when the loan was made therefore clearly does not come under article 40.

(ii) Article 46 does not say whether the agreement or promise is made in writing. In that sense, article 46 cannot be said to be a specific article which governs guarantee as in the present case. To be specific, article 46 must say "breach of a promise in writing to do anything at a specified time". Since it does not say so, it is necessary to look at other articles which govern contract in writing because there is no question that the letter of

guarantee in this case is a contract in writing. article 94 provides a 6 year limitation period for 'Compensation for the breach of a contract in writing' and the time from which period begins to run is 'When the period of limitation would begin to run against a suit brought on a similar contract not in writing'. In *Kong Ming Bank Bhd v Sim Siok Eng* [1982] 2 MLJ 205 a Privy Council case on the interpretation of the SLO, it is held that although if a case comes within a specific article such as article 40, there is no room for the application of a general article, the application of article 94, which extends the period of limitation for contracts in writing, is not thereby excluded; article 94 was intended to substitute 6 years for any lesser period of limitation for any claim for compensation based on a breach of contract, where the contract was in writing, while retaining as the time from which the period was to run the time specified in the article, appropriate to the type of contract from which the right to sue was founded. Since the plaintiff's suit against the defendants was instituted on 9 November 2001, the suit is well within 6 years from the date of the first demand dated 6-08-1998 and is therefore not time-barred.

(iii) Further, the payments made under the account by the first defendant have the effect of enlarging or extending the limitation period as against the defendants. The acknowledgement of the debt and part payments made are done within three years from the first demand to all the defendants. Section 19(1) of the SLO provides that:

> If, before expiration of the period prescribed for a suit in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgement was so signed".

Further, the plaintiff asserts that the acknowledgement of its indebtedness by the first defendant and part payments made under the account have also the effect of enlarging or extending the limitation period as against the defendants on the grounds that:

(a) the first defendant's admission/acknowledgement of its debt was binding on the defendants as guarantors based on their liability as principal debtors under the guarantee (see *Oriental Finance Bhd*), clause 5 of the guarantee reads:

This Guarantee shall be a continuing guarantee to you to the extent of RM2.45m for the purpose of securing not merely an equivalent amount but (subject always to the said limit of RM2.45m) the whole of the moneys or general balance in Clause 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest on the sum claimable from me/us at the rate which is levied on the Customer from time to time from the date of my/our receiving demand for payment thereo

Clause 11 of the guarantee reads:

Any admission or acknowledgement in writing by the Customer or any person authorised by the Customer of the amount of indebtedness of the Customer to you and any judgment recovered by you against the Customer in respect of such indebtedness shall be binding and conclusive against me/us

Clause 11 of the guarantee reads:

As a separate and independent stipulation, I/we agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the Customer or by any other fact or circumstances and whether known to you or not shall nevertheless be recoverable from me/us or each of us as sole or principal debtors and shall be paid by me/us on demand

If the acknowledgement and/or payment of the debt by the first defendant enlarged the period of limitation against the first defendant, the same acknowledgement and/or payment also enlarged the limitation period against the defendants since it was agreed under the guarantee that 'Any admission or acknowledgement in writing by the Customer or any person authorised by the Customer of the amount of indebtedness of the Customer to you and any judgment recovered by you against the Customer in respect of such indebtedness shall be binding and conclusive against me/us'.

I have read the O14A application and the relevant documents and the submissions of the parties in detail. I am inclined to agree with the submission of the plaintiff and my reasons are as follows:

(i) The Privy Council decision in the case of *Kong Ming Bank Bhd* did not deal with demand guarantee. In that case, the appellant bank had given an unsecured overdraft accommodation to the respondent. Subsequently, in order to increase the overdraft facility, the respondent charged his lands to the bank to secure the repayment on demand of the overdraft up to a maximum of $90,000. The overdraft was allowed to exceed $90,000 and the account was dormant from 4 November 1974 when the appellant made a payment of $65,000, thereby reducing the

overdraft to $194,957.12. In 1978, the bank brought an action to recover the whole of the sum owing on the overdraft. The only defence of substance was the plea that the claim was statute-barred under the provisions of the Limitation Ordinance of Sarawak. The learned judge of the High Court ruled against the plea and gave judgment for the appellant. On appeal to the Federal Court, it was held that the claim was statute-barred as provided in article 40 of the Schedule to the Limitation Ordinance, as in the absence of any stipulation for a demand for repayment on the overdraft, time ran from the date of the loan or from the last payment of interest or part payment of principal which in this case was 4 November 1974 and three years had elapsed, since that date before the action was brought. The Federal Court held that art 97 was not applicable as the bank's action was not for compensation for breach of a contract in writing. It was held as follows:

(1) it is plain that the suit falls within the description in article 40 of the Schedule to the Limitation Ordinance for it was a suit 'for money lent under an agreement that it shall be payable on demand'. If as the appellant urged, the parties agreed that demand must be made, there is no way of avoiding the conclusion that the words of the article aptly describe the appellant bank's claim. Time therefore began to run when the loan was made;

(2) in this case as there had been a payment on 4 November 1974 this date has under s 20 of the Limitation Ordinance to be substituted for the date when the loan was made;

(3) although if a case comes within a specific article such as article 40 there is no room for the application of a general article, the application of article 94, which extends the period of limitation for contracts in writing, is not thereby excluded; article 94 was intended to substitute six years for any lesser period of limitation for any claim for compensation based on a breach of contract, where the contract was in writing, while retaining as the time from which the period was to run the time specified in the article appropriate to the type of contract from which the right to sue was founded;

(4) the claim in this suit may properly be described as one for compensation for breach of contract and the contract being in writing, the period of limitation is six years and in this case had not expired when the action was commenced.

(ii) On the facts of the case, it is clear that a demand guarantee is related to a secondary liability and not a primary document. Thus, liability commences from the date of demand. If the guarantor refuses to

comply with the demand, he will be deemed to have breached the contract of guarantee and that will not attract article 40 and/or 46 as argued by the defendants, but will attract article 94 (see *The Kwong Yik (Selangor) Banking Corporation, Ltd*).

(iii) The case of *Kong Ming Bank Bhd* deals with overdraft facility on demand which relates to contract which is rooted on primary liability. A letter of guarantee is not so. And thus, there is a distinction and that case is not directly on point on the facts before this court.

[7] In conclusion, I take the view that the plaintiff's action against the defendants is not statute-barred and since the first defendant has by its letter dated 12 August 1998, acknowledged or impliedly admitted that it is indebted to the plaintiff in the sum of RM2,562,623.46 as at 30 July 1998 and since it is agreed under the guarantee that any admission or acknowledgement in writing by the first defendant of the amount of indebtedness shall be binding and conclusive against the guarantors, judgment may be entered against all the defendants jointly ie the first to eighth defendants with the proviso that the guarantors' liability is only limited to RM2.45m (see *Oriental Finance Bhd*).

[8] As parties have agreed that the quantum can be referred to the registrar for assessment, I hereby order the issue of the sum due and owing by all the defendants be assessed by the registrar. On the issue of costs, the defendants are to pay the plaintiff costs. The getting up fees shall not exceed RM20,000, in respect of this action excluding the costs to be incurred for the purpose of assessment. If costs cannot be agreed, the plaintiff is at liberty to tax the costs. The registrar is to settle the terms of this judgment as order of court upon assessment of the sum due and owing with interest as prayed in the statement of claim. I hereby order so.

Application allowed with costs.

Reported by Andrew Christopher Simon